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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
Petitioners,
v.
EVELYN ELLIOTT AND BENITO MOLINA, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
Petitioners,
v.
FANNIE BUFFINGTON AND FRANCES BINER, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many

* The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 42(2).

of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

One of the principal tools for obtaining redress under the federal civil rights legislation for violations of constitutional and statutory rights is the class action. In fact, the Advisory Committee's Note to the 1966 amendment to Rule 23 indicates that Rule 23(b)(2) is intended to function as an effective vehicle for the bringing of suits alleging racial discrimination. *See* Advisory Committee Note reprinted at 39 F.R.D. 98, 102. The Lawyers' Committee and its local committees, affiliates, and volunteer attorneys are presently litigating numerous class action lawsuits aimed at the vindication of civil rights of large numbers of people. Our interest in these consolidated appeals derives from the fact that we have utilized nationwide class actions in this effort, and currently are involved in two such actions: *Rowe* v. *Bailar*, Civ. No. 77-1943 (D.D.C.) (involving discriminatory employment practices in the Postal Service's bulk mail handling facilities throughout the country), and *Wright* v. *Blumenthal*, Civ. No. C-76-1426 (D.D.C.) (seeking to compel the Internal Revenue Service to end the practice of granting tax-exempt status to private schools which practice racial discrimination in their admissions policies).

In the cases now before this Court, the plaintiffs successfully challenged the procedure utilized by the Secretary of HEW to recoup overpayments to beneficiaries of Title II of the Social Security Act on the ground that Petitioner's failure to give adequate notice and the opportunity for an oral evidentiary hearing before recoupment violated the due process clause of the Fifth Amend-

ment. The correctness of this ruling is the principal issue presented, but the Court has also agreed to consider an additional question raised by the government in its petition:

> Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of § 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process Social Security cases.

The Court of Appeals held, correctly in our view, that maintenance of the *Buffington* case as a nationwide class action under Rule 23(b)(2) was not only proper but would also advance the interests of judicial administration and serve the ends of justice. 564 F.2d at 1229-30. The government contests this ruling and seems to argue that both nationwide certification and the issuance of injunctive relief were inappropriate. Adoption of this position would have ramifications far beyond the confines of these cases, and could hinder our ability to obtain meaningful relief in a broad range of civil rights cases.[1]

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[1] *Wright* v. *Blumenthal* is an apt illustration of why this is so. In 1969, on behalf of individual black parents and students in Mississippi, the Lawyers' Committee filed suit in the federal district court in the District of Columbia to enjoin United States Treasury officials from granting tax-exempt status to private schools in Mississippi which had racially discriminatory adminissions policies. The suit was brought as a class action on behalf of black parents of school children attending the Mississippi public schools. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), the court entered a declaratory judgment in the plaintiffs' favor and issued an injunction restraining the IRS from approving any applications for tax-exempt status from any private school located in Mississippi unless the school demonstrated, in accordance with criteria specified in the order, that it had a nondiscriminatory admissions policy. Not only did the Service fail to implement this Order in Mississippi, but because the injunctive order bound the defendants only with respect to schools in that state, the Service took no action to establish whether private schools located in other states which applied for tax-exempt status had nondiscriminatory policies, even though such schools often interfered

The Lawyers' Committee therefore files this brief as a friend of the Court urging that, in the event the Court reaches the class action question,[2] it affirm this aspect of the Court of Appeals' judgment.

STATEMENT

These suits were brought to challenge the recoupment procedures of the U.S. Department of Health, Education and Welfare in recovering overpayments to recipients of benefits under Title II of the Social Security Act. In each instance, the plaintiffs sought class certification, although the scope and the geographical boundaries of the classes are dissimilar.

Elliott v. *Califano* was filed in the United States District Court for the District of Hawaii. A class was certified consisting of all social security old-age, survivors', and disability insurance beneficiaries in Hawaii whose benefits were or might be subject to recoupment.[3] (The government has registered no objection to the statewide class designated in this case.)

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with implementation of desegregation plans required by federal court order, *see Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). Accordingly, to avoid the necessity of state-by-state adjudication, in 1976, salaried attorneys on the staff of the Lawyers' Committee, together with other attorneys, filed a nationwide class action on behalf of 63 individual plaintiffs in seven states (now styled *Wright* v. *Blumenthal*) to compel the IRS to cease granting tax-exempt status to private schools throughout the United States which practice racial discrimination. This suit is still pending.

[2] The government advanced several of the same contentions in *Califano* v. *Mandley*, —— U.S. ——, 56 L.Ed.2d 658 (1978), but the Court vacated the judgment and remanded without reaching the issue of nationwide relief.

[3] The Court divided the class into two subclasses depending upon whether their exposure to recoupment was based upon their own annual earnings reports or upon other evidence, such as the administrator's discovery of his own error. *Elliott* v. *Weinberger*, 371 F. Supp. 960, 964 n.6 (D. Hawaii 1974).

Buffington v. *Califano* was filed in the United States District Court for the Western District of Washington by two named plaintiffs. On April 8, 1974, the court certified a nationwide class of recipients of old-age and survivors' benefits[4] "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The government filed a motion to alter the definition of the class and, to meet the stated objections,[5] the plaintiffs suggested changes which were adopted by the court. The class was redefined to exclude residents of Hawaii and of the Eastern District of Pennsylvania[6] and "all other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging his practice of reducing or otherwise adjusting social security benefits without prior notice and opportunity for a hearing, if a decision on the merits in any such action was entered on or before October 18, 1974." App. at 259-261.

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[4] Since there was no named plaintiff receiving disability payments, the nationwide class excludes recipients of this type of benefit. Consequently, recipients of disability payments who reside in Hawaii presently receive an oral evidentiary hearing prior to any adjustments while disability recipients in the rest of the country do not.

[5] In a memorandum of law filed on October 3, 1974, the government argued that the court should exercise its discretion to modify the definition of the class for four reasons: "(1) the wealth of similar litigation currently pending throughout the country, (2) the extreme administrative burden which nationwide certification would impose, (3) the very real legal and practical problems pertaining to res judicata and collateral attack, and (4) relevant considerations of judicial efficiency and the orderly pursuit of justice." Record, Court of Appeals, Vol. II, p. 404.

[6] The Court was advised that the United States District Court for the Eastern District of Pennsylvania had held the recoupment procedures to be violations of due process, and that the government was appealing the adverse judgment. *Mattern* v. *Weinberger*, 377 F. Supp. 906 (E.D. Pa. 1974), *vacated*, 519 F.2d 150 (3rd Cir. 1975), *vacated*, *Mathews* v. *Mattern*, 425 U.S. 987 (1976), *on remand*, 427 F. Supp. 1318 (E.D. Pa. 1977), *rev'd*, 582 F.2d 248 (3rd Cir. 1978), *pet. for cert. filed*, 47 U.S.L.W. 3318 (U.S. Nov. 7, 1978).

In the Court of Appeals, the government claimed, *inter alia*, that the district court in *Buffington* abused its discretion in certifying a nationwide class action. The Ninth Circuit rejected this argument, characterizing the case as the "classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)." 564 F.2d at 1229. Addressing the government's contention that the class should not have been designated because it was too large, the court held that there were no manageability problems in this (b)(2) class action and stressed the salutary effect of class certification in avoiding a multiplicity of actions raising precisely the same constitutional claims adjudicated in the case at bar. On the merits, the Court of Appeals sustained the district courts' determinations that the Secretary's recoupment procedures were constitutionally defective and affirmed the grants of injunctive relief.

Amicus cannot tell from the government's argument, set forth in § II.B.4. of its brief, whether it takes the position (a) that nationwide certification was an abuse of the trial court's discretion on the facts of this case, (b) that nationwide certification is never proper under Rule 23, or (c) that it was the issuance of injunctive relief, and not certification of a nationwide class, which requires reversal. We respectfully suggest to the Court that the government's treatment of these issues is not only confusing but also inadequate, and that the government has failed to comply with Supreme Court Rules 40(1)(G) and 40(5). Under these circumstances, and because resolution of the issue will not affect the merits of this appeal, we urge the Court to defer consideration of the question entirely. *Cf. Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975). If, on the other hand, the Court determines to decide the issue, we urge that the judgment of the Court of Appeals on this aspect of the case be affirmed.

ARGUMENT

CERTIFICATION OF A NATIONWIDE CLASS IS CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND PROPER JUDICIAL ADMINISTRATION; MOREOVER, IT IS PARTICULARLY APPROPRIATE IN CASES INVOLVING POLICIES OF NATIONWIDE APPLICATION ADOPTED AND IMPLEMENTED BY FEDERAL OFFICIALS[7]

The government maintains that the district court abused its discretion in certifying a nationwide class in *Buffington*, but it offers no adequate justification for its conclusion. The government nowhere contends, for example, that the formal requisites of Fed. R. Civ. P. 23(a) and (b)(2) are not satisfied in *Buffington*. The action is clearly one falling within Rule 23(b)(2) since "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Moreover, the prerequisites of Rule 23(a) are met since (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

[7] Petitioner argues that any form of class action is improper under § 205(g) of the Social Security Act, which it says provides the only means of reviewing the determination of a claim by the Secretary, because absent class members may not have exhausted administrative appeals. We do not address this narrow question, although we note that such class actions have been sustained. *E.g., Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 343-47 (3rd Cir. 1977). Furthermore, in Title VII cases, this Court has clearly *rejected* the notion that class-based relief in the context of back pay awards and seniority can be barred for those unnamed class members who have not filed administrative complaints with the EEOC. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 (1975). Our view of the government's other arguments on the nationwide class claim is the same whether jurisdiction is predicated on § 205(g) or on 28 U.S.C. § 1361.

class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23 does not on its face contain any proscription or limitation on classes nationwide in scope.[8]

Instead, the government apparently relies on imperfectly articulated notions of judicial policy which it believes are impaired by nationwide class actions. Properly viewed, these considerations support the use of nationwide class actions in circumstances like those of *Buffington*.

A. The District Court Did Not Abuse Its Discretion in Entertaining a Nationwide Class Action to Deal with a Problem Which Is Nationwide in Scope But Subject Also to Nationwide Control by the Petitioner.

According to statistics set forth in the Petitioner's brief, 1.25 million Social Security old age, and survivor's beneficiaries are overpaid annually. (Pet. Br. at 45-46.) The recoupment procedures set forth in § 204(b) of the Social Security Act are therefore applicable to large numbers of people throughout the country. Where individual plaintiffs challenge the sufficiency of such procedures on purely legal grounds unrelated to the particular circumstances of individual beneficiaries, nationwide class certification is not only permissible, but it is desirable in order to promote judicial efficiency and avoid a multiplicity of lawsuits raising the same issue on a state-by-state or judicial district-by-judicial district basis. All such cases would involve recoupment procedures which affect all recipients in the same manner. Repetitive litigation would maximize rather than protect against the risk of inconsistent adjudications of the Secretary's responsibilities,

[8] The government argued in the Court of Appeals that the district court violated due process by its failure to require notice to the class, and abused its discretion in certifying a nationwide class because it was unmanageable, but has not raised either of these points in its brief. Therefore, neither issue is before this Court. Supreme Court Rule 23(1)(c).

which could be resolved only by the decision of this Court.[9] Hence, the district courts should have the discretion to certify a nationwide class action when in their judgment there are no problems of manageability and such treatment of an important legal issue would be desirable.

Nationwide classes have been certified in numerous federal cases under Fed. R. Civ. P. 23(b)(2), including social security cases, although this Court has not previously had occasion to address the question explicitly, *e.g.*, *Aznavorian* v. *Califano*, 47 U.S.L.W. 4037 (U.S., Dec. 12, 1978), *rev'g on other grounds*, 440 F. Supp. 788 (S.D. Cal. 1977) (individuals eligible for Supplemental Security Income); *Murry* v. *Department of Agriculture*, 413 U.S. 508 (1973), *aff'g* 348 F. Supp. 242 (D.D.C. 1972) (food stamp recipients subject to "tax dependent" disqualification); *Norton* v. *Weinberger*, 418 U.S. 902 (1974), *vacating on other grounds*, 364 F. Supp. 1117 (D. Md. 1973) (children otherwise eligible for social security benefits who were not living with or were not supported by their father at the date of his death); *Bermudez* v. *Department of Agriculture*, 160 U.S. App. D.C. 150, 490 F.2d 718 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973) (impoverished persons denied retroactive food stamp adjustments after wrongful withholding due to administrative error); *Rocky Ford Housing Authority* v. *Department of Agriculture*, 427 F. Supp. 118 (D.D.C. 1977) (individuals and organizations which would benefit from implementation of rural rent supplement program); *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C. 1976) (tenants in housing projects subsidized under § 236 of National Housing Act); *Metropolitan Area Housing Alliance* v. *HUD*, 69 F.R.D. 633, 638-39 (N.D. Ill. 1976) (owners and renters of residential properties covered by

[9] Nevertheless, Petitioner argues against nationwide class certification because it may cause this Court to review rulings affecting procedures of national application "prematurely". *See* pp. 12-15, *infra*.

mortgages insured by the Federal Housing Authority subject to dispossession under a HUD "vacancy requirement"); *Woodward* v. *Rogers*, 344 F. Supp. 974 (D.D.C. 1972) (passport applicants required to swear or affirm allegiance); *see also, Ste. Marie* v. *Eastern R.R. Ass'n*, 72 F.R.D. 443 (S.D.N.Y. 1976) (female employees of defendant located in eighteen-state area).

Nationwide class actions have also been certified in Rule 23(b)(1) and Rule 23(b)(3) actions. *E.g., United States* v. *Larinoff*, 431 U.S. 864 (1977), *aff'g* 533 F.2d 1167, 1181-1187 (D.C. Cir. 1976); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 492-94 (N.D. Ill. 1969); *West Virginia* v. *Charles Pfizer & Co.*, 314 F. Supp. 710, 723 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d. Cir.), *cert. denied sub nom. Colter Drugs, Inc.* v. *Charles Pfizer & Co.*, 404 U.S. 871 (1971).

This substantial experience with nationwide class actions demonstrates that the problems contemplated by the government either have not arisen or have been properly handled through the district courts' discretion.[10]

B. No Valid Policy Considerations Support The Government's Contention That Nationwide Class Actions Should Not Be Permitted.

The government's argument that nationwide class certification should be discouraged because it precludes

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[10] In *Buffington*, the district court exercised its discretion by limiting the scope of the nationwide class so as to exclude not only the statewide class members in Hawaii covered by the *Elliott* order and the class members in the Eastern District of Pennsylvania covered by *Mattern* v. *Weinberger, supra*, but also

> . . . all other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging [the same practice] . . . if a decision on the merits in any such action was entered on or before [the entry of judgment in *Buffington*].

This exclusion assured that the order entered by the *Buffington* court would in no way conflict with any other order of any other federal district court which had previously ruled on the issues raised in *Buffington* and thereby subject the Secretary to conflicting injunctive obligations.

multiple consideration of the same legal issue by federal courts flies in the face of Rule 23. "The class action was an invention of equity . . . mothered by the practical necessity of finding a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs. . . ." *Montgomery Ward & Co.* v. *Langer*, 168 F.2d 182, 187 (8th Cir. 1948). One of its important functions is to eliminate the possibility of repetitive litigation. C. Wright, THE LAW OF FEDERAL COURTS 306 (2d ed. 1970). And, as the Court of Appeals said in *Elliott*:

> [i]t would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result.
>
> Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice.

564 F.2d at 1229-30.

Despite the common sense of this observation, the government frequently relitigates the same issue, rather than seeking review in this court of adverse rulings, in an effort to obtain authorization to administer national programs as it desires in at least part of the country.

Such repetitive litigation strategy was roundly criticized in *May Department Stores* v. *Williamson*, 459 F.2d 1147 (8th Cir. 1977) (concurring opinion). There, the Eighth Circuit held that the U.S. Postal Service is not immune from garnishments to effectuate state court judgments. In his concurring opinion, Judge Lay suggested, as an alternative to the Court's holding on the merits, that

the U.S. Postal Service should be collaterally estopped from relitigating the issue. In 1975, the Seventh Circuit had decided the identical issue against the government. Motions for rehearing and rehearing *en banc* in that case had been denied, and the government had elected not to petition for *certiorari*. Nevertheless, the Postal Service continued to claim immunity, at enormous judicial—and ultimately public—expense:

> The government's refusal to follow the dictates of the Seventh Circuit decision has created a wave of repetitious litigation and confusion in federal district courts throughout the United States. . . . At least a dozen other district courts in five circuits have heard garnishment requests and entered orders of memoranda in accord with the Seventh Circuit opinion. . . . The government is appealing many of these decisions, admittedly in an attempt to obtain a favorable opinion from another circuit before seeking review by the Supreme Court.

549 F.2d at 1150.

Judge Lay condemned the practice of repeated litigation under these circumstances, proposing application of the collateral estoppel doctrine and citing *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313 (1971). (549 F.2d at 1149.) He emphasized that, where the only issue is one of narrow statutory construction (as with the Social Security provision before the Court here), consideration by several Courts of Appeals is not beneficial to the Supreme Court. The "government litigation strategy of forum shopping is grossly outweighed by the tremendous burden and costs placed on the federal courts by its continuing relitigation of the same issue." 549 F.2d at 1150.

The government argues that it is desirable to have different aspects of an issue explored by the lower courts, and that nationwide class certification effectively precludes this. The government relies on *Divine* v. *Commissioner of Internal Revenue*, 500 F.2d 1041, 1049 (2d Cir. 1974), for the proposition that it would be "imprudent, if not irresponsible" for any one judicial decision to foreclose further consideration by other courts. The *Divine* court's comment, however, was based upon peculiarities of tax refund suits and its reasoning actually supports the use of nationwide class actions in other, appropriate cases such as *Buffington*.

Divine involved the question whether a corporation could properly reduce its earnings and profits to account for compensation expenses incurred through sales of stock to employees at reduced prices pursuant to restricted stock options. In addition to their argument on the merits, the taxpayers contended that the IRS was collaterally estopped by virtue of a decision by the Seventh Circuit against the government on the identical question. Finding this Court's pronouncements on collateral estoppel not controlling [11] in the context of the question before it, the Court of Appeals turned to policy considerations to resolve the question.

First, the Court took pains to distinguish cases arising under the tax laws from other statutes, on the basis of the former's unusual complexity and the complicated array of facts typically involved in any case. Second, the Court pointed out, because the IRS has traditionally refused to regard the decisions of the Courts of Appeals as binding beyond the circuit, the only dispositive answer can come from this Court. Since a conflict among Circuits is often a necessary prerequisite to Supreme Court review, the Court of Appeals was unwilling to adopt a position that would have the effect of inhibiting *expeditious* Supreme Court review. 500 F.2d at 1049. The

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[11] *See Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079 (U.S., Jan. 9, 1979).

reason for rejecting the collateral estoppel argument, according to the *Divine* court, was to avoid a result which "would decrease the probability that a conflict [leading to Supreme Court review] will be created as quickly as possible." Id. 1049-1050.

Unlike the questions of tax law addressed by the Court in *Divine*, the issue in this case is a narrow question of pure law not likely to be affected by the factual context of cases in different jurisdictions. Rather than permitting consideration of disparate fact patterns, the government's policy of repetitive litigation simply delays the ultimate resolution of the substantive question—precisely what the *Divine* court was trying to avoid.

The government also argues that nationwide class action certification may lead this Court to grant review of an issue which it might not consider pressing but for the nationwide impact of a decree. Many factors go into this Court's decision to grant *certiorari* to review the decisions of the Courts of Appeals, and the scope of the relief ordered may be a relevant consideration in assessing the public importance of the matter. Supreme Court Rule 19. However, nationwide class relief is apt to be granted only in cases involving implementation of federal programs affecting millions of individuals (another indication of public importance).

This Court is fully capable of protecting its discretionary jurisdiction. In some cases, it may affirm the judgment of the lower court on the merits without further consideration. In others, it may issue a stay of any injunctive order pending full consideration by the Court. The Court may vacate the judgment and remand for reconsideration if it appears that the issues were not properly ventilated, or if intervening changes in the law have altered the posture of the legal issue presented. *E.g.*, *Mattern* v. *Weinberger*, *supra*. *Amicus* suggests that the government's concern is not with this Court's

docket but rather with its own timetable for seeking review by the Court.

The certification of a nationwide class action is not only appropriate under Rule 23, but is a judicious method of achieving finality of decision as soon as possible in order to achieve consistent application of policy in a federally administered benefit program. If the government is dissatisfied with the decision, it may seek a stay from the District Court, Court of Appeals, or this Court while it brings a case up for review. This is preferable to the altogether too frequent practice of relitigating the issue in the several Circuits without seeking Supreme Court review of unfavorable judgments. This practice can result in undesirable, geographically piecemeal implementation of federal program requirements and even constitutional rulings. As Judge Lay stated in *May Department Stores* v. *Williamson supra*, 549 F.2d at 1150:

> [w]here there exists an important national question, as here, and there is an obvious means available to achieve finality of decision, the government should not avoid review simply because it believes the Supreme Court might rule against it, or because it disagrees with the decision of a lower federal court.[12]

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[12] Certification of a nationwide class action is also consistent with the policies underlying creation of the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407. These policies promote the just and efficient conduct of civil actions involving one or more common questions of fact pending in different judicial districts and avoid the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts. *See In Re Plumbing Fixture Cases*, 298 F. Supp. 484, 490-492 (Jud. Pan. Multi. Lit. 1968). In *Illinois* v. *Harper & Row Publishers, Inc.*, *supra*, a case involving a transfer under § 1407, the district court to which the case was transferred certified a Rule 23(b)(3) nationwide class action.

C. Nationwide Injunctive Relief In a Nationwide Class Action Is Authorized by Rule 23(b)(2) and Did Not Constitute an Abuse of Discretion in This Case.

The government's argument that the court erred in directing the petitioner to afford the same due process hearings to all recipients of Old Age and Survivors' benefits can be characterized only as frivolous. Rule 23 (b) (2) itself provides for injunctive relief on behalf of the entire class:

> 2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

It is true that in some areas, notably in cases involving issues of federalism, this Court has indicated that injunctive relief should be sparingly applied. *See, e.g., Rizzo* v. *Goode*, 423 U.S. 362 (1976). *But see, Wooley* v. *Maynard*, 430 U.S. 705 (1977). Any such considerations are absent from this case.

The cases cited by the Petitioner are totally inapposite. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971); and *Milliken* v. *Bradley*, 418 U.S. 717 (1974) all involve the parameters of injunctive relief by federal district courts in school desegregation and state legislative reapportionment cases. They do not support the broad proposition that equity jurisprudence does not permit the courts to redress wrongs on behalf of a class similarly situated to the named plaintiffs. Indeed, contrary to the implication in Petitioner's argument that the injunction in this case benefits persons not suffering injury, by definition there is no difference between the named plaintiffs and the class they represent.

Furthermore, injunctive, rather than declaratory, relief is necessary to provide full protection to the plaintiffs and the members of the class. The Secretary's actions in this and other cases make it clear that he will apply decisions unfavorable to the recoupment policy only in those jurisdictions covered by district court or appellate court decisions enjoining his policy. Absent injunctive relief during the pendency of any appeals, recipients, whose benefits are reduced to accomplish repayment or who are required to refund the amount overpaid by a different method pursuant to § 204, without adequate notice or hearing, would be required to sue the government to recover illegally recouped funds. Such claims may well be regarded as retroactive benefits and recovery barred by the doctrine of sovereign immunity. *Cf. Edelman* v. *Jordan*, 415 U.S. 651 (1974).

While injunctive relief would require the government to forego recoupment without notice or hearing until final appellate review has been secured, with possible loss of payment (either because class members may no longer be receiving benefits or because they have no independent means), on balance, the social security recipients' interest outweighs the government's under circumstances where the statutory provision at issue is designed to forego recoupment except in narrowly prescribed situations. In addition, judicial economy is served by injunctive relief if such relief avoids the possibilities of additional litigation by, for example, avoiding mootness which would also result in multiple actions. *Hoehle* v. *Likens*, 530 F.2d 229 (8th Cir. 1976); *Woe* v. *Mathews*, 408 F.Supp. 419, 429 (E.D.N.Y. 1976).

CONCLUSION

In suggesting that judicial policy precludes certification of nationwide class actions in all cases, the Petitioner seeks to prove too much. Nothing in Rule 23 supports such a notion and the district courts have followed the dictates of informed discretion in granting class relief

national in scope, especially when the validity of administrative practices under federal benefit programs are successfully challenged. The determination of when nationwide adjudication is appropriate should remain where it properly belongs—within the sound discretion of the federal district courts. Nothing in the Petitioner's brief suggests that that discretion was abused in this case and, accordingly, this aspect of the decision below should be affirmed.

Respectfully submitted,

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